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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

C. M. ROUSSEAU, JR., ET AL,
Petitioners,

V.

TELEDYNE MOVIBLE OFFSHORE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does an employer, by exacting an implied "agreement" with its employees to its practice of non-payment, escape an obligation to compensate the employees for "waiting time" during which the employer requires the employees to remain on its premises under threat of termination? In the setting in which this question arises, the employer's premises are not offshore or at any other remote location, and during the waiting time the employees are not actively engaged in physical labor.

2. If the answer to the first question is "yes," then can there be a valid implied agreement when the employees' assent is nothing more than their failure to quit after complaining to the employer of its unilateral changes in the number of compensable hours in the regular

workweek and other circumstances of employment?

3. Does an employer, in the circumstances described in question no. 1 above, escape the obligation to pay the employees for waiting time by offering them limited recreational activities when the employees have clearly expressed a preference to leave the premises? Can the employer escape such obligation by claiming that unpaid and forced waiting time might assist the employer in securing business which might result in work for the employees for which they would get paid?

LIST OF PARTIES

Petitioners are the following sixty-three (63) individuals: Cornelious Aucoin, George W. Bassett, Clifford S. Beard, Harry Bellard, Mark S. Blackledge, Kenneth Breaux, Gary Brown, Tommy L. Brown, Earl Brunet, James D. Butler, William E. Chandler, Keevin Comeaux, Paul Daigle, Donald M. Daigrepont, Leland H. Davis, John Perry Deville, John D. Dixon, Sr., Winston R. Douget, Jimmy R. Edison, Travis J. Frederick, Ned Gauthier, Layman E. Gilmore, Joseph Guillory, Adam J. Guidry, Sr., Joe F. Hall, Bruce A. Hebert, Michael S. Hebert, Paul Hitt, Jr., Junius Hoffpauir, David D. Holmes, Leroy Holmes, Richard D. Holmes, Dixie Hughes, Donald E. Hugonin, James D. Jones, Lloyd A. Jones, Louis M. Kern, Seaborn L. Lott, Ronnie J. McCormick, Barney L. McCurley, Virginia McCurley, Gilbert Mouton, Earl P. Neil,

Sr., John Wesley Phillips, Purvis J. Picard, Wayne A. Pitalo, Harry J. Poirrier, C. M. Rousseau, Jr., Donald E. Sanders, Clifford D. Scott, Harry J. Smart, Stifford Sonnier, Gary J. Stelly, George W. Stelly, Jimmy Strickland, Joyce Ray Stringer, Wendell Sullivan, Jr., Edward A. Todd, Lovelace Touchet, Bobby J. Williber, Artis Ray Windham, Johnnie R. Windham.

Respondent is Teledyne Movible Offshore, Inc.

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REFERENCE TO REPORTS OF OPINIONS OF COURTS BELOW

The original opinion of the Court of Appeals for the Fifth Circuit is reported at 805 F.2d 1245 (5th Cir. 1986) and is reprinted in the appendix separately accompanying this petition for writ of certiorari at page 1.

The opinion of the Court of Appeals for the Fifth Circuit denying rehearing is reported at 812 F.2d 971 (5th Cir. 1987), and is reprinted in the appendix at page 16.

The original opinion of the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, is reported at 619 F.Supp. 1513 (W.D. La. 1985), and is reprinted in the appendix at page 20.

The ruling of the United States District Court for the Western District of

Louisiana denying a new trial is reprinted in the appendix at page 77.

JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals, Fifth Circuit, dated December 16, 1986, entered on the same date.

Petitioners' motion for rehearing was denied by the same court on March 16, 1987.

The statutory provision conferring jurisdiction on this court by writ of certiorari is 28 U.S.C. 1254(1).

APPLICABLE STATUTES AND REGULATIONS

Fair Labor Standards Act

The applicable portion of the Fair Labor Standards Act of 1938, as amended (FLSA) is found in 29 U.S.C. 207(a)(1), which provides that no employer

> "shall employ any of his employees . . . for a work week longer than forty hours unless such employee receives compensation for his employment in excess of [forty] hours at a rate not less than time and one-half times the regular rate at which he is employed."

Code of Federal Regulations--Interpretive Guidelines By Administrator Of Wage and Hour Division Of Department of Labor

The guidelines relating to waiting time are found at 29 C.F.R. 785.14, et seq., and are reproduced in the Appendix, with the more relevant ones marked for convenient reference.

STATEMENT OF THE CASE

Course of Relevant Proceedings And Disposition in the Courts Below

The original petitioners filed their complaint on October 17, 1983, in the United States District Court for the Western District of Louisiana seeking payment under the FLSA for certain times that they were required by their employer to be physically present on the employer's premises (less the time they spent eating, sleeping, and in personal pursuits) (the "hours employed" claim).

After the employer later discharged most of petitioners, they further amended their suit to allege that the discharges were motivated by their original claims in violation of the anti-retaliation provisions of the FLSA, 29 U.S.C. 215(a)(3) (the "retaliation" claim).

Jurisdiction for both the hours worked and the retaliation claim in the

district court was authorized by 28 U.S.C. 1331 and 29 U.S.C. 216(b).

A trial on the issue of liability only was held on the hours employed claim without a jury, with the court finding in favor of the employer. A trial on the issue of liability only was held on the retaliation claim before a jury, with a verdict rendered in favor of the petitioner-employees. However, the court granted the employer's motion for judgment n.o.v. and for a conditional new trial.

On December 16, 1986, the United States Court of Appeals, Fifth Circuit, affirmed the dismissal of petitioners' hours worked claims. It reversed the district court's grant of the judgment n.o.v., but affirmed its grant of the new trial on the retaliation claim. On March 16, 1987, the court of appeals denied petitioners' application for a rehearing.

While petitioners disagree with the court of appeals' affirming the grant of a new trial on the retaliation claim, this petition for a writ of certiorari seeks relief only as to the hours employed claim.

Statement of the Facts

The respondent employer is engaged in offshore drilling, fabrication of offshore fixed structures, and erection and maintenance of offshore fixed structures. The petitioner-employees were engaged in the latter activities, being assigned to three huge, football field-sized derrick barges which are used to lift offshore structures from cargo barges and place them in position on the Gulf of Mexico floor. They were also employed and the derrick barges are also used in connection with the maintenance and repairs to fixed offshore structures, for fighting blow-outs, for laying pipelines, and for

engaging in other similar activities concerning fixed offshore structures. The barges are not self-propelled and must be towed to locations by tugboats. The sixty-three petitioners were employed as crane operators, riggers, welders, engineers, cooks, and time clerks.

When all or most of the employees were hired the barges worked almost full time in the Gulf of Mexico. When they were hired their understanding was that they would work at least twelve scheduled hours per day on a seven day "hitch." They would then be off seven days.

Due to declining work, by the fall of 1982 the barges were spending a great portion of their time at dock at the employer's facility at Amelia, Louisiana, very near Morgan City. When the barges were dockside the employees performed maintenance on the derrick barges and on the employer's cargo barges, and a number

of them also worked with the fabrication yard employees in constructing new offshore platforms and components.

On October 1, 1982, shortly after most of the employees began spending most of their time dockside, the employer unilaterally announced that it was cutting the employees' regular daily hours from twelve to eight, except when the barges were called out on income-producing jobs and on which occasions the twelve hour schedule would apply. The effect of this change in hours on the employees' earnings was dramatic, since the greatest portion of the employees' earnings came from those hours in the work week in excess of forty which were worked at time and one-half, and the eight hour day eliminated most of these overtime hours. In fact, the reduction in hours had the effect of reducing earnings by approximately one-half.

During this same period when the barges were staying mostly dockside and when the employees' working hours were cut, the employer's no-leave rule, which was not publicized previously, "came into focus," as the employer's manager described it. Whereas, as the employer's officials conceded, a good number of the employees may not have known of the rule before (because the barges were almost always offshore and it was not practical to leave), they were now required to stay on the barges or within the fenced enclosure at Amelia during the time they were not engaged in physical work. In such situation, the barges were dockside, and but for the employer's no-leave rule they could have easily left the employer's premises to return home or pursue other matters of their own personal interest.

The employees constantly objected to the application of the no-leave rule to

the dockside situation. These complaints, however, were to no avail and the employer threatened the employees with dismissal for any violations of the rule.

The industry practice of other area derrick barge employers was to allow employees to leave their premises after physical work was performed.

The employer stipulated to the reasons for the no-leave rule. One was that the employer wanted to have a full crew already assembled on board the derrick barges in the event that it should be able to secure a job with a customer who may wish to have a barge towed to an offshore location at sudden notice. The employer also claimed it was concerned about its legal liability under the Jones Act and general maritime law for on-shore injuries. The employer further claimed that it was concerned about safety in that if employees were allowed their freedom

they may choose to drink and might report to work in an intoxicated condition. Finally, the employer claimed a humanitarian desire to avoid discharging any of these employees who might report to work under the influence of liquor.

Approximately one week after the employees filed their original suit, the employer terminated its no-leave rule.

While the no-leave rule was still in effect the employees were allowed very little freedom. They could not leave the employer's premises to go home, even though some of them lived short distances away and could return upon short notice if needed. They could not go home even for personal reasons. They could not leave to watch a movie or eat at a restaurant. They could not leave to pursue a second job. They could not leave for any purpose.

The employees could essentially do nothing except watch television and VCR movies, listen to music, read, eat, play cards and similar games, sleep, and play pingpong. The employees were not even allowed visitors.

ARGUMENT

Reasons That Writ Should Be Granted

A writ should be granted in this case because the decision of the court of appeals, if left standing, will conflict with prior decisions of this court and will abrogate the guidelines of the Administrator of the Wage & Hour Division which have been in effect well over forty years. The lower court's decision, if left standing, has the potential of causing an upheaval in what heretofore has been well-settled practices in waiting time cases, affecting hundreds of thousands and perhaps even millions of American workers. Further, because of one of the lower court's own earlier decisions, Allen v. Atlantic Richfield Co., 724 F.2d 1131 (5th Cir. 1984), and/or the court's interpretation of that decision, it appears that the instant case may not

represent an isolated decision and instead represents the beginning of a trend.

Rationale of Court of Appeals Decision

It is respectfully submitted that the lower court's decision directly conflicts with the two landmark decisions in waiting time cases, Armour & Co. v. Wantock, 323 U.S. 126 (1944) and Skidmore v. Swift, 323 U.S. 134 (1944), and, further, is inconsistent with Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 741 (1981). Still further, while the lower court did not acknowledge that it was doing so, its decision directly overrules the waiting time guidelines issued by the Administrator of the Wage & Hour Division, notwithstanding that this court has recognized the expertise of the Administrator and that "good administration of the [FLSA] and good judicial administration alike require that" court rulings be at odds with the guidelines

"only where justified by very good reasons." Skidmore, 323 U.S. at 140.

Contrary to Armour and Skidmore, the court of appeals appeared to bottom its decision upon a finding of an "agreement" between the employer and the employees, and nothing more. The court of appeals implied the agreement solely because the employees continued in their employment after the dockside practices began. There is no other evidence in the record or cited in the opinion to support a finding of an agreement. See Appendix p. 7.

The court of appeals did mention petitioners' claim that the waiting time was primarily for the benefit of the employer, and thus compensable. The court, however, rejected this claim, holding that the waiting time was primarily for the benefit of the employees, on grounds that the employees were free to engage in the limited recreational

activities provided. It also endorsed the district court's finding that it was the employees who benefited from the no-leave policy because of the view that unpaid waiting time may assist the employer in securing business which would result in paid hours to the employees. See Appendix, pp. 9-10.

Adverse Effects of
Court of Appeals' Decision

It is respectfully submitted that the court of appeals' decision and its rationale, if allowed to stand, will produce unintended and adverse effects.

First, as a procedural matter it would quite effectively nullify private enforcement of the FLSA. The court's rationale that failure to quit one's employment means that he has entered into a valid agreement legitimating the offending practice means that the employee is put into a "Catch-22" situation: He

cannot successfully sue unless he quits his job when the offending practice is put into effect. Yet, on the other hand, if he quits he (1) no longer has a job by which he can feed his family and (2) he does not have any lost wages for which he can even bring suit. Surely such a result was not intended by Congress!

Second, as a substantive matter employers will be free to change what heretofore have been settled practices in waiting time situations, potentially affecting very large numbers of U.S. employees.

Petitioners do not dispute that if employees voluntarily wait at an employer's premises in hopes of getting a day's or a few hours' work, such as in the practices in the stevedoring and certain other industries, the waiting time is not in the "employ" of the employer and therefore is not compensable. However,

prior to the instant case whenever employees have been required by the employer to remain on the employer's premises the waiting time has been held to be compensable. The court of appeals' decision promises to change such practices.

For example, hotel operators who may want to have a reserve of food, service, or maintenance employees available to meet any unknown business demand could require any number of their employees to remain on the premises for unpaid periods of short or even indefinite duration, perhaps twenty-four hours a day for a week or more, just as in the instant case. After all, it would be an easy matter to provide them with a place to sleep,[1] food, and the

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[1]Apparently there would not even be a requirement to provide sleeping facilities if the employer did not retain the employees on its premises past normal sleeping times.

limited recreational activities provided by respondent.

As another example, the court of appeals' decision could prompt hospitals to provide recreation and dormitory[2] rooms for nurses, x-ray technicians and other personnel to facilitate a requirement that they remain on the premises after their regularly scheduled shifts for extended periods. Thus the employer hospitals would have personnel readily on hand to meet any emergencies and at the same time avoid the cost of paying employees for waiting time.

The same would be true for factory owners, who may want, among other things, to have employees available if regularly scheduled workers should become ill or to have full maintenance crews available to handle any breakdowns; to 24-hour super-

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[2]See footnote 1.

markets who may want to pay for only as many clerks as are actually needed and still have additional ones in waiting whenever check-out lines get too long; to department stores who may have the same desire; to restaurant owners who may want to have additional staffing available should enough patrons show up to require it; and to a host of other employers too numerous to name here.

Lower Court Decision
Contrary to Decisions of This Court

The key word in the relevant portion of the FLSA, 29 U.S.C. 207(a)(1), quoted supra, is "employ." If an employer does not "employ" its employees in a waiting time situation, then there is no obligation to compensate the employees. Conversely, if the employees are "employed," then they are entitled to compensation.

The statute does not define "employ," so it is appropriate to resort to previous judicial interpretations and, as indicated, it is also appropriate to be guided by the administrative interpretations by the Administrator of the Wage & Hour Division.

As mentioned above, Armour and Skidmore are the leading cases in the area and involve facts very similar to those of the case reviewed here.

In Armour the court was faced with a case in which the employees, company firemen, were required to be on active duty from 8:00 A.M. to 5:00 P.M., during which time they had specific duties to perform. From 5:00 P.M. to 8:00 A.M. the employees were required to remain on the premises but were free to spend their time doing anything they desired as long as it was on the premises of the employer. The employees were provided eating, sleeping,

recreation and entertainment facilities so that they could enjoy their inactive time.

It is clear that there was a finding or an assumption that the employees had agreed to the employer's practice of providing no pay for the required waiting time.

The lower court held that the time between 5:00 P.M. and 8:00 A.M., except for the usual hours for eating and sleeping, was work time within the meaning of the FLSA. The Supreme Court affirmed, stating:

> "We think the Labor Standards Act does not exclude as working time periods contracted for and spent on duty in the circumstances disclosed here, merely because the nature of the duty left time hanging on the employees' hands and because the employer and the employees cooperated in trying to make the confinement and idleness incident to it more tolerable." (Emphasis added.) 323 U.S. at 134.

In Skidmore, decided on the same day as Armour, the Supreme Court was faced with a similar situation. Here again the employees were employed as private fire fighters and "[u]nder their oral agreement of employment," (emphasis added) 323 U.S. at 135, had specific daytime hours during which they performed specific duties. They claimed that the time during which they were "employed" within the meaning of the FLSA also included the nights during which they were required to be on the employer's premises or within hailing distance subject to call, even though they were not required during this time to perform any specific task except answering alarms, which were very rare. The parties stipulated that the employees "agreed" to this arrangement. (Emphasis added.) 323 U.S. at 136.

Unlike the lower court in Armour, the district court made no findings of fact as

to whether the fire-hall duty constituted working time, and decided as a "conclusion of law" "the time spent in the fire-hall subject to call . . ." does not constitute hours worked. Ibid. The court of appeals affirmed.

For the reasons set forth in Armour, the Supreme Court reversed. Since the Supreme Court felt that the district court's factual inquiry was apparently restricted by its erroneous view of the law, it remanded the case for further proceedings consistent with its decision. Even though the Supreme Court remanded, it is submitted that it made abundantly clear what it expected the basic outcome to be. Its intent is evident in its comments that, while eating and sleeping activities would occupy the firemen's time anyway,

> "the rest of the time is different because there is nothing in the record to suggest, even though pleasurably spent, it was spent in the ways that the men

would have chosen had they been free to do so." (Emphasis added.) 323 U.S. at 134.

Thus, the Supreme Court seems to have been saying what is provided in the Administrator's interpretive bulletins, which are discussed below and set forth in the Appendix: if the employer substantially restricts its employees' freedom to do as they wish or leave the premises, then the time constitutes hours worked because they have been "employed to wait."

Therefore, the controlling decisions of this court, Armour and Skidmore, do not allow for an interpretation that an agreement between the employer and the employees can justify the employer's failure to compensate the employees for waiting time when the employees' freedom to leave or to do as they wish is substantially impaired.

This view was repeated and made more specific in Anderson v. Mt. Clemens

Pottery Co., 328 U.S. 680 (1946). While much of Mt. Clemens Pottery dealt with "preliminary" and "postliminary" activities prior to or subsequent to the work day, the court announced that the work week ordinarily includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." 328 U.S. at 690-691. (Emphasis supplied.)[3] The decision below in favor of the employer on the waiting time issue was allowed to stand only because there was no evidence that the employer had required employees to wait.

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[3]The Portal to Portal Act, 29 U.S.C. 251-62, overruled Mt. Clemens in part concerning preliminary and postliminary activities, but did not change the rule concerning an employer engaging an employee to wait.

Also of significance is Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 741 (1981), and the numerous Supreme Court cases cited therein, and which contained the following quotation from Tennessee Coal Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 602-603:

> "'The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts.... Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.'" (Emphasis added.)

Still further, if this court agrees with the lower court that there can be a valid agreement to waive rights which employees would otherwise have under the FLSA, then it must be possible to have valid employee waivers of other similar

rights. Are we to say, for example, that a woman gives up her equal pay rights under 29 U.S.C. 206(d), which is also part of the FLSA, by continuing to work for her employer who pays men more for identical work? Are we to say that an employee of a protected class validly agrees to waive his Title VII rights when he continues to work for a discriminating employer?

Surely the law cannot countenance an agreement by which employees waive FLSA rights which they otherwise would have, and petitioners urge that this court so hold.

Lower Court Decision Is Contrary to Administrator's Guidelines

In Skidmore this court acknowledged that the guidelines were "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case," 323 U.S. at 134, and that "[g]ood

administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. 323 U.S. at 140. See also General Electric Co. v. Gilbert, 429 U.S. 125, 141-142 (1976); Meritor Savings Bank FSB v. Vinson, 54 U.S.L.W. 4703, 4706 (June, 1986).

The decision below is at complete variance with the Administrator's guidelines and is insupported by any reasons for such.

The Administrator's guidelines concerning waiting time are set forth in the appendix, and the more relevant provisions are marked with stars for the court's ready reference. Found throughout the guidelines is the requirement that employees be paid for waiting time unless they are free to leave the employer's

premises. While petitioners urge the court to read all of the guidelines, certain of them are of particular significance:

29 C.F.R. 785.15 gives examples of employees deemed to be on duty who must be compensated, even though they are not engaged in active physical labor. The resaon for such is that the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. Skidmore, as well as a number of other cases are cited in support.

29 C.F.R. 785.16 delineates when an employee is off duty such that his time is not compensable. It provides than an employee is not completely relieved from duty and cannot use the time effectively

for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived.

29 C.F.R. 785.17 once again directs that an employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working on call and must be compensated. The regulation cited Armour, supra, inter alia.

29 C.F.R. 785.22 relates to situations where the employer furnishes sleeping facilities and the employees are not able to use their waiting time effectively for their own purposes as in the Armour and Skidmore situations. In such situations the employer and the employee may agree to exclude from compensable time bona fide meal periods

and bona fide regular sleeping periods of up to eight hours, assuming the employee can usually enjoy an uninterrupted night's sleep. But the agreement, if there is one, can only exclude the bona fide meal and sleeping periods; the rest of the time is compensable.

If An Agreement Legitimates A No-Leave Policy, Does An Employee's Failure to Quit Constitute Such An Agreement?

As indicated above, petitioners take the view that the results in Armour and Skidmore, as well as the comments in Mt. Clemens Pottery, clearly show that an agreement to a no-leave policy is not a defense to a claim for compensation for waiting time when the employer requires that the employees remain on his premises. If the court should disagree with this view, however, then petitioners urge that, as a matter of law, an agreement cannot result from the mere fact that employees

do not quit their jobs when the offending practice is put into effect or comes into "focus."

The court of appeals cited Shepler v. Crucible Fuel Co., 140 F.2d 371, 374 (3rd Cir. 1949) for the proposition that continuance of employment can be evidence of an implied agreement to the terms of that employment. However, the rule which arose in the factual context of Shepler should not be applied here.

In Shepler, watchmen had been paid a certain monthly wage prior to the passage of the FLSA. After the enactment of the FLSA, the employer proposed to pay the watchmen an hourly wage, with overtime pay at the correct multiple, for overtime hours. The total amount of pay at the end of a month was equal to the pre-act monthly pay. Thus in Shepler the employees did not agree to a loss of income

or to any adverse change in working conditions.

The rule of Shepler simply ought not to be applied to the instant case, where the failure to quit is deemed to be an agreement to be confined to the employer's premises at the new dockside location and at the same time suffer a fifty percent reduction in wages.

Furthermore, this court has not allowed other compelling and coercive options to go unredressed in other cases which have come before it, and the present Hobson's choice should not be countenanced either.

Although Garrity v. State of New Jersey, 385 U.S. 493 (1967) was a criminal case, it involved an employment situation wherein the Court found that police officers were coerced into losing their means of a livelihood or either in-

criminating themselves. The Court struck down the coercive conduct therein.

More particularly, the facts in Garrity showed that police officers accused of fixing traffic tickets could refuse to answer questions at an investigatory hearing, in which an officer would thereupon be removed from office pursuant to a state statute for failure to testify. Or, the officer could testify, make incriminating statements against himself, and waive his constitutional rights against self-incrimination.

This court held there was no legal waiver of rights because of the coercive nature inherently within the option presented to the police officers.[4]

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[4]Other cases cited in Garrity show compelling economic coercion inherent in the options presented to certain employers. The Court would not allow the options to legally stand.

Just as there was no waiver in Garrity, there should be no waiver of the employees' rights to compensation here.

Does the Employer's Provision Of Limited Recreational Activities, Or The Possibility That the Unpaid Workplace Incarceration May Produce A Later Paying Job, Absolve the Employer Of The Obligation To Compensate For Such Waiting Time?

While the court of appeals' decision appears to have been bottomed upon the finding of an agreement, it also seemed to endorse the finding of the district court that, because of the limited recreational activities made available and because potentially the unpaid waiting time might help to produce a paying job, the waiting time was actually more for the benefit of the employees and less for the benefit of the employer. That finding appeared to mitigate in favor of a decision for the employer.

Petitioners submit, however, as indicated above, that the most meaningful criteria, if not the sole criteria, should be the degree to which an employee's freedom is impaired. Further, in evaluating the degree of impairment, whenever the employee is not allowed the leave the premises his freedom quite obviously is very substantially impaired. Therefore, the limited recreational activities which were provided by respondent should have no bearing upon the outcome of this case. After all, the employer chose these recreational activities. By the employer's decision to prohibit the employees from leaving the premises, the employer removed the employees' freedom to chose any other activities.

Also, it is very respectfully suggested that a moment's thought will reveal the invalidity of the lower court's view that the unpaid workplace incarcera-

tion was more to the benefit of the employees than to the employer because it might help produce jobs in which the employees could receive earnings.

In the first place, there was not a shred of evidence in the record to support such a view.

Second, under the lower court's view forced unpaid waiting time would never be for the benefit of an employer, because it could always be said that such waiting time would assist the employer and any assistance given to the employer might help produce more business, which in turn would produce more paying jobs. The lower court's logic simply eliminates from our consideration any benefit which can be given to an employer because in its view benefit to an employer is in reality benefit to the employees.

Third, such a view obviously conflicts with the intent of the FLSA, since

employees are to be paid whenever they are in the employ of their employer, irrespective of whether such work may produce additional work in the future.

Fourth, such unpaid waiting time obviously predominated to the benefit of the employer, as the employer was able to control the actions of its employees in accordance with its wishes without having to pay anything for it. If the waiting time truly was for the benefit of the employees, then there would be no need for the employer's requirement, enforced by threat of dismissal, that the employees not leave the premises.

CONCLUSION

It is clear that when the employer docked its derrick barges at its maintenance facility it was practical for it to allow the employees to leave the premises after they had worked their eight hour shift. The Supreme Court decisions in Armour, Skidmore, and Mt. Clemens Pottery, as well as the Administrator's regulations interpreting those cases, all require that an employee be relieved of duties and be allowed to leave the employer's premises so that he may spend the time away from the employer's facility as he so chooses. If the employer requires an employee to remain on the premises, then he has engaged the employee to wait even if there is no physical activities to be performed.

Further, an employer's directing its employees to remain on its premises but

not be compensated for idle waiting time cannot amount to a legally cognizable agreement to accept compensation for time actually engaged in physical labor just because the employee continues to work under such an arrangement.

Petitioners respectfully request that the decision of the United States Court of Appeals for the Fifth Circuit be reversed, and that this case be remanded to the United States District Court for the Western District of Louisiana for a trial to determine the amount of their monetary damages.

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BY: _____
RANDALL G. WELLS

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

C. M. ROUSSEAU, JR., ET AL,
Petitioners,

V.

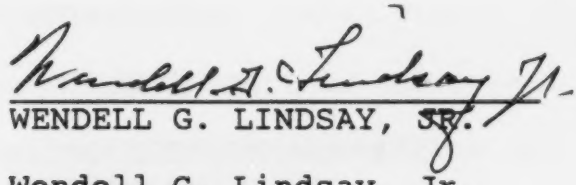
TELEDYNE MOVIBLE OFFSHORE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, Wendell G. Lindsay, Jr., a member of the bar of this Court, hereby certify that on this 15th day of June, 1987, three copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above

entitled case were mailed, first class, postage prepaid, to Mr. Greg Guidry, Post Office Box 3507, Lafayette, Louisiana 70502, counsel for the respondent, Teledyne Movible Offshore, Inc. I further certify that all parties required to be served have been served.



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OPINIONS OF THE UNITED STATES

COURT OF APPEALS, FIFTH CIRCUIT

A. Original Opinion

C.M. ROUSSEAU, JR., ET AL,
Plaintiffs-Appellants,

V.

TELEDYNE MOVIBLE OFFSHORE,
INC., Defendant-Appellee.

No. 86-4050.

United States Court of Appeals
Fifth Circuit

805 F.2d 1245, 5th Cir. 1986,
Dec. 16, 1986

Appeal from the United States District Court for the Western District of Louisiana

Before THORNBERRY, DAVIS and HILL, Circuit Judges

THORNBERRY, Circuit Judge:

This is an appeal from an order dismissing plaintiffs' claim for wages under the Fair Labor Standards Act ("hours worked claim") and from a judgment notwitstanding the verdict on plaintiffs'

claims of retaliatory discharge ("the retaliation claim"). We affirm the district court's dismissal of the hours worked claim. However, because we believe that reasonable minds could differ on the merits of the retaliation claim, we reverse the district court's judgment notwithstanding the verdict.

A complete review of the factual background in this case is contained in the district court's well-reasoned opinion. Rousseau v. Teledyne Movible Offshore, Inc., 619 F.Supp. 1513 (D.C. La. 1985). We will not belabor the complete factual details here, but will note salient facts as they become important.

Defendant-appellee Teledyne Movible Offshore, Inc. ("Teledyne") is a large company engaged in what presently remains of the domestic offshore oil industry. The company owns three derrick barges. All sixty-three plaintiff-appellants

("the employees") in this case are employed by Teledyne on the derrick barges.

The Hours Worked Claim

The employees worked for Teledyne on a "hitch" basis, spending seven full days working and living on the barges and then seven full days not working or living on the barges. The basis of the employees' hours worked claim is Teledyne's "no leave" policy. This policy required the employees to remain on the barges during their hitches. Thus, even when the employees were not engaged in actual physical labor, Teledyne required them to remain on board the barges. The employees received compensation only for the time spent in active labor.

During the great oil boom of the 1970's, the derrick barges spent most of their time offshore working on various jobs. As the price of oil dropped,

fewer offshore jobs became available and the barges spent increasingly more time docked. In addition, Teledyne reduced the number of working hours. Nonetheless, Teledyne's no leave policy did not change--even when the barges were docked, the employees were required to remain on board the barges during their off-duty time. This "non-labor" time remained uncompensated.

The employees brought suit under the Fair Labor Standards Act ("FLSA"), claiming that Teledyne owed them compensation for the time spent on the barges not allocable to eating or sleeping. 29 U.S.C. §§ 201-219.[1]

---

[1]The employees attacked the no leave policy as applied when the barges regularly operated offshore as well as when the barges were regularly docked. The offshore claim was dismissed in a pre-trial partial summary judgment. The remainder of the claim was tried before the bench. The employees make only a half-hearted attempt to appeal the summary judgment, preferring to concentrate their argument on the time spent on the docked barges. Our agreement with the district court's analysis of the compensability issue extends to all time spent on the barges, whether offshore or docked.

The FLSA provides in pertinent part that no employer "shall employ any of his employees . . . for a work week longer than forty hours unless such employee receives compensation for his employment in excess of [forty] hours at a rate not less than time and one-half the regular rate at which he is employed." 29 U.S.C.§207(a)(1). The employees argue that they were "employed" by Teledyne during the time they were required to remain on the barges, even though they were not engaged in active labor.

The Supréme Court has held that time spent by employees not actively engaged in physical labor can be compensable time under the FLSA. Armour and Co. v. Wantock, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118 (1944). However, the Supreme Court has also noted that issues of compensability are highly fact specific. An inquiry into compensability

> involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service and its relation to the waiting time, and all the surrounding circumstances.... The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.

Skidmore v. Swift and Co., 323 U.S. 134, 137, 65 S.Ct. 161, 163, 89 L.Ed. 124 (1944).

The district court found that Teledyne and the employees operated under an agreement that the employees would only receive compensation for the hours spent in physical labor. This is a finding of fact. Id., see also Allen v. Atlantic Richfield Co., 724 F.2d 1131 (5th Cir. 1984). This finding must stand unless clearly erroneous. Fed.R.Civ.P. 52(a). Although the existence of an agreement may not be controlling in all cases, it is usually relevant to the compensability

issue.

The record supports the district court's finding of an agreement between Teledyne and the employees. Representatives of Teledyne testified to informing the employees of the policy at various times. Indeed, many of the employees who testified admitted at least some awareness of the policy.

Of course, it is clear that the employees did not like the no leave rule. But their dislike does not negate the existence of an agreement. As the district court pointed out, continuance of employment can be evidence of an implied agreement to the terms of that employment. Shepler v. Crucible Fuel Co., 140 F.2d 371, 374 (3rd Cir. 1949). In any event, as we cannot say that the district court's finding of an agreement is clearly erroneous, it must stand.

The employees also argue that the time they spent on the barges not actively working was time spent primarily for the benefit of the employer and thus compensable time under the FLSA. As did the district court, we reject this argument.

This conclusion is consistent with our holding in Allen v. Atlantic Richfield Co., 724 F.2d 1131 (5th Cir. 1984). In that case, 22 security guards brought suit against their employer, Atlantic Richfield ("Arco"), alleging a statutory right under the FLSA to overtime pay. During a strike by production employees, Arco required the security guards to work 12 hour shifts each day. Arco required the guards to remain within the confines of the refinery during their 12 hour off duty period. Arco compensated the guards for any actual work done during this off duty time. Otherwise, this off duty time was not compensable.

In recognizing that there are instances in which time spent on the premises of the employer is not compensable time, the Allen court noted that "whether time was compensable working time depended 'upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecurity hours that the employee is subject to call, without being required to work.'" Id., at 1137 (quoting Skidmore, 323 U.S. at 138, 65 S.Ct. at 163). The Allen court found evidnece in the record to support a conclusion that the guards were free to engage in a variety of recreational activities during their off duty hours. This created a fact question sufficient to preclude summary judgment on the issue of compensable time. Allen, 724 F.2d at 1137.

In the present case, the record reflects that Teledyne offered its employees

a variety of recreations and amusements during their off duty times. According to the district court

> [t]he stipulated facts and evidence show that during their off duty time on the barges, the plaintiffs were free to sleep, eat, watch television, watch VCR movies, play pingpong or cards, read, listen to music, etc. They seldom or never did any physical work after their shift ended and if they did they were paid for it pursuant to the agreement.

Rousseau, 619 F.Supp. at 1520.

Moreover, as the district court pointed out, the record indicates that the employees actually benefited from the no leave policy, at least potentially. By remaining on the barges during the off duty times, the employees could take advantage of any jobs that might come up on short notice, with the accompanying possibility of overtime work. In short, any benefits derived by Teledyne from the no leave policy do not, on these facts, create a claim for compensable time.

The Retaliation Claim

The employees' claims of retaliatory discharge were tried to a jury. The plaintiffs alleged that they were laid off because of the filing of the hours worked lawsuit. Teledyne attributed the layoffs to a precipitous decline in the offshore oil business. The jury returned a verdict for the employees.

The district court granted Teledyne's motion for judgment notwithstanding the verdict, noting that "there was no evidence whatsoever that the defendant's decision to lay off the plaintiffs was in retaliation for the wage and hour lawsuit. The evidence and inferences point so strongly in favor of Teledyne Movible Offshore that reasonable minds could not arrive at a contrary verdict." Rousseau, 619 F.Supp. at 1525.

We review the district court's decision under the now familiar standard of

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc). We must scrutinize the record carefully and view all the evidence in the manner most favorable to the party opposing the motion. Spurlin v. General Motors Co., 528 F.2d 612, 614 (5th Cir. 1976). The judgment n.o.v. can only be sustained if we find that no reasonable juror could have rationally concluded that Teledyne discharged the plaintiffs in retaliation for the filing of the hours worked lawsuit.

We disagree with the district court's statement that there is "no evidence" to support the plaintiffs' claims. First, there is the so-called "bulletin board incident." A representative of the company, Mr. Ken Theriot, placed a copy of the lawsuit on a company bulletin board and, during a speech to the employees, indicated that Teledyne might

suffer severe economic hardship were the suit successful. Some employees testified that the speech was threatening. Mr. Theriot explained his actions as merely an attempt to explain the difference between the lawsuit and the then pending union organizational drive. He explained that the lawsuit was distinct from the union and that an employee did not have to join the union in order to assert any rights in the lawsuit.

In other words, the testimony concerning the bulletin board incident is conflicting. A reasonable juror could have concluded that the posting of the lawsuit and the speech by Mr. Theriot was intended to intimidate the employees who had filed the FLSA claim. Thirty-seven of the sixty-three plaintiffs were in fact terminated. Viewed in the light most favorable to the employees, the bulletin board incident provides a basis for a reasonable

juror to make a finding of retaliation. The evidence is by no means compelling, especially given the stipulation by the parties that the economic slowdown played some part in the layoffs. Nonetheless, the evidence precludes a judgment n.o.v.

The employees' other major support for the retaliation claim was testimony concerning Teledyne's refusal to implement a Partial Compensation Plan ("PCP"). This state program would have allowed the employees to work for Teledyne on a part-time basis and also draw unemployment compensation. Again, the record was conflicting on the merits of this program. Teledyne representatives testified that the program was considered as an alternative to a layoff. The company adopted a lay off plan as a more effective way of cutting costs. Witnesses for the plaintiffs testified that the PCP program would have saved the company

more money than a layoff. As with the bulletin board incident, this evidence is by no means compelling. Still, a reasonable juror could have concluded that the company's failure to implement the PCP and its subsequent termination of the plaintiffs indicated retaliation on the part of Teledyne.

Although we reverse the district court's judgment n.o.v., our disposition does not result in a reinstatement of the jury's verdict. In granting the judgment n.o.v., the district court also granted a conditional motion for new trial. This decision will not be disturbed "in the absence of a clear abuse of discretion." McClain v. Seabord Coast Line R.R. Co., 473 F.2d 357, 359 (5th Cir. 1973). Because we find no such abuse in this case, we remand the retaliation claim pursuant to the district court's order.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

B. Decision on Rehearing

C.M. ROUSSEAU, JR., ET AL
Plaintiffs-Appellants,

V.

TELEDYNE MOVIBLE OFFSHORE, INC., Defendant-Appellee.

No. 86-4050.

United States Court of Appeals, Fifth Circuit

812 F.2d 971 (5th Cir. 1987)
March 16, 1987.

Appeal from the United States District Court for the Western District of Louisiana.

Before THORNBERRY, DAVIS and HILL, Circuit Judges.

ON PETITION FOR REHEARING

(805 F.2d 1245, 5th Cir. 1986, Dec. 16, 1986)

PER CURIAM:

In the plaintiffs' petition for panel rehearing they contend the panel was

incorrect in affirming the district court's alternative granting of a new trial on the plaintiffs' retaliation claim. The panel stated:

> Although we reverse the district court's judgment n.o.v., our disposition does not result in a reinstatement of the jury's verdict. In granting the judgment n.o.v., the district court also granted a conditional motion for new trial. This decision will not be disturbed "in the absence of a clear abuse of discretion." McClain v. Seabord Coast Line R.R. Co., 473 F.2d 357, 359 (5th Cir. 1973). Because we find no such abuse in this case, we remand the retaliation claim pursuant to the district court's order.

The plaintiffs complain that a remand for new trial is inappropriate because the evidence on their retaliation claim was not against the great weight of evidence--the standard for granting a new trial. See A.A. Spurlin v. General Motors Corp., 528 F.2d 612, 620 (5th Cir. 1976). Plaintiffs insist that the panel tacitly agreed with this argument because it reversed the district court's

j.n.o.v., i.e., finding substantial evidence to support the verdict on the retaliation claim. We reject this argument as incorrect.

It is a well-settled rule in this circuit that "a verdict can be against the 'great weight of the evidence,' and thus justify a new trial, even if there is substantial evidence to support it." Shows v. Jamison Bedding, Inc., 671 F.2d 927, 930 (5th Cir. 1982); United States v. Bucon Construction Co., 430 F.2d 420, 423 (5th Cir. 1970); 11 C. Wright & A. Miller, Federal Practice and Procedure §2806, at 43 (1973). We found legally sufficient evidence to support the verdict, thus foreclosing a j.n.o.v. However, the district court did not abuse its discretion in finding the verdict against the great weight of the evidence--thus mandating a new trial. Our result implies what we clarify today: a new trial can be

appropriate even when a judgment n.o.v. is not.

The petition for rehearing is therefore DENIED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

C. M. ROUSSEAU, JR., ET AL

VS. CIVIL ACTION

TELEDYNE MOVIBLE OFFSHORE, INC. NO. 83-2553

O P I N I O N

Plaintiffs have filed this lawsuit under the Fair Labor Standards Act claiming entitlement to pay for all time not reasonably allocable to eating and sleeping and other personal time when they were off duty but not allowed to leave the barges that they worked on.

In addition to this claim, twenty-four of the original plaintiffs amended their complaint to add a second cause of action under the Fair Labor Standards Act. This cause of action alleges that Teledyne Movible Offshore, Inc., the defendant,

laid off these particular plaintiffs on March 1, 1984 in retaliation for their filing of the lawsuit.

The trial was bifurcated, resulting in the claims for overtime being tried by the Judge while the retaliatory discharge claims were tried by a jury. The jury returned a verdict for the plaintiffs and the defendant has filed a motion for judgment notwithstanding the verdict or in the alternative a new trial.

Teledyne Movible Offshore, Inc. is a company engaged in the business of fully servicing the oil and gas industry offshore. Its construction department consists of two divisions, the fabrication yard at Amelia, Louisiana and the offshore division, the division of the company involved in this litigation. In the offshore division, the company owns three derrick barges.

The derrick barges are used to lift offshore structures from cargo barges and place them in position on the Gulf of Mexico floor. They are also used to perform maintenance and repair work to fixed offshore structures, for fighting blowouts, for laying pipelines, and for engaging in other similar activities concerning fixed offshore structures. These derrick barges are not self-propelled and must be towed to offshore locations by tug boats.

All sixty-three plaintiffs in this matter were employed on defendant's derrick barges in connection with the barges' activities in offshore construction. Individual plaintiffs were engaged in various jobs on the derrick barges, including rigger foreman, rigger leaderman, rigger first class, crane operator, barge engineer, crane engineer, barge clerk, barge welder, and cook. All

plaintiffs in this matter were paid an hourly rate, ranging from $7.25 per hour to $13.10 per hour.

The plaintiffs, at all relevant times, worked and work for defendant on a "hitch" basis, spending seven days working and living on defendant's derrick barges, and then spending seven days not working or living on defendant's derrick barges. The seven-day hitch begins on Thursday and ends on the following Thursday.

Defendant's seven-day "workweek" runs from midnight Wednesday to the midnight of the following Wednesday. The first 40 hours worked by the employee after he begins his hitch on Thursday are compensated at the regular hourly rate. All hours worked in excess of forty, between Thursday and midnight Wednesday, are compensated at a rate of one and one-half times the hourly rate. All time worked on

the last Thursday of the hitch, since it is in a new workweek (and the employee's eighth day), is compensated at the regular hourly rate.

All plaintiffs, at all material times, were regularly assigned a daily schedule of hours within which to perform their various job functions. Prior to October 1, 1982, this regular daily schedule had always been twelve hours, regardless of whether the derrick barges were engaged in income-producing work or not, and whether or not they were docked. The one exception to the twelve-hour schedule was that of the cook, whose normal daily schedule was fourteen hours. In October of 1982, in an effort to reduce costs because of drastically declining derrick barge utilization, representatives of defendant made a decision to reduce the derrick barge crews' regular daily work

schedule when the derrick barges were on non-income-producing jobs. For most employees, this meant a reduction of the normal twelve-hour day to an eight-hour day. The cooks were reduced to a daily work schedule of nine and one-half hours. Except for the reduced daily schedule, there was absolutely no change in the company's pay system or policies. This reduced regular schedule on non-income-producing jobs was the practice from October 1, 1982 until the time of this lawsuit. At times when the derrick barges were "working" during this period, the employee reverted to a twelve and twelve schedule.

Sometimes, some derrick barge employees would work in excess of the daily schedule of hours. These times were normally when the barges were working and were normally limited to situations

involving special jobs, such as rig moves, and in emergencies. All employees and plaintiffs were paid for all time worked in excess of the regular daily schedule. Employees considered this extra work desirable, because of increased earnings. The opportunities for the "extra time" became less and less as derrick barge utilization on income-producing jobs decreased. When the derrick barges are not working and are docked, the derrick barge employees seldom or never exceeded or exceed the regular daily schedule.

After the derrick barge employees are released from the day's active or physical labor, normally in the form of the daily regular schedule, they are completely released from all job duties and are free to engage in such activities as are available in the living quarters aboard the derrick barges, including watching

television and VCR movies, listening to music, reading, eating, playing cards and similar games, sleeping, playing ping-pong (on at least two of the three derrick barges), playing darts (on at least two of the three derrick barges), fishing and generally attending to personal needs.

The living quarters of the derrick barges are similar to those found on many offshore drilling platforms, with recreation rooms, sleeping quarters and large galleys (in which derrick barge employees are allowed to have access to food and drink at any time during their off-duty periods).

The meal period taken during the employee's work shift is generally paid time. Off-duty meal periods are before and after the regular daily schedule, or after the day's work was completed, and employees could take generally as much

time as they wanted to in eating these meals, depending on their own off-duty schedule, their own eating habits, and their own personal desires. Additionally, they could and did spend time snacking in their off-duty hours.

During their off-duty periods, each derrick barge employee was in fact subject to being called to work, if circumstances required. However, the experiences of individual plaintiffs demonstrate that they were either never, seldom, or infrequently called upon to perform job duties after they had been released from the day's work and before their next day's work began, particularly when the barges were docked and are not working. When the derrick barges are working, derrick barge employees are divided into two separate crews, with one working the day shift, and the other working the night shift. Most

employees alternate or rotate the day and night shifts, working a day shift one seven-day shift, and the night shift the next seven-day hitch. When the barges are not working, however, all crew members typically work the day shift only, there being no need for two shifts.

Given normal business conditions, the normal location of the derrick barges was somewhere in the Gulf of Mexico. In 1977, the derrick barges had an 88% utilization rate for the year, meaning they were being utilized on income-producing jobs 88% of the time. Even when not working, the barges typically stayed in the Gulf. Subsequent years indicate the following utilization rates: In 1978, the utilization was 66%, in 1979 it was 51%, in 1980 it was 50%, in 1981 it was 32%, in 1982 it was 27%, and in 1983, the year that this lawsuit was filed, it was 14%.

As a result of these drastically declining percentages, the company was forced to make several cost-cutting changes. On January 30, 1980, it released the first tug boat that was under contract to tow the barges from location to location. On February 28, 1981, it released its other contract tug boat. Rather than keep the derrick barges in the Gulf of Mexico when not working, the company began to have them towed in to various sites. One such site is the construction departments' fabrication yard at Amelia, Louisiana. At other times, the derrick barges were tied up at various sea buoys in the Gulf, several miles offshore. Another site that the derrick barges were brought to when there were no income-producing jobs was inside Belle Passe. Belle Passe is the name for the place where the mouth of an inland waterway

meets the Gulf of Mexico, on the coast of Louisiana between Leeville and Grand Isle, Louisiana, and near Fourchon City, Louisiana. When the derrick barges were "inside" Belle Passe, meaning in the inland navigable waterway, as opposed to the sea buoy one or two miles in the Gulf "outside" of the Passe, they would normally be anchored to one side of the navigable waterway. If the barge was located at Belle Passe in the navigable waterways, derrick barge employees would be bused from Amelia to the docks at Fourchon City, a two to two and one-half hour bus ride, and then transferred to the derrick barge by some form of marine transportation.

At all relevant times to this lawsuit, the Company has for numerous years had a policy of requiring derrick barge crews to reside on the derrick

barges during the seven-day hitch, even at times when the derrick barge was docked at the Amelia, Louisiana fabrication yard. The reasons for the policy at dockside were several, including liability and safety concerns, a desire to avoid having to take disciplinary action due to employees drinking and related rule violations, and the desire and need to remain in a "movable" status with a full crew aboard.

Plaintiffs testified that they did not like the company's no-leave policy when it was in effect, particularly after their income was reduced because their regular schedule of hours was reduced from twelve to eight hours after October of 1982 when the barges were docked at Amelia. Several complained about the pay reduction and about having to stay aboard, yet all continued working, with full

knowledge that they would be paid only for time actually spent in productive job duties.

All plaintiffs were fully aware of and understood at all times, before and after the "cut" that they were to be paid only for those hours actually spent in physical or active labor, and that they were not to be paid for their off-duty time on the barges, except when called upon to perform extra work due to the exigencies of the job.

The Court will first address the claims for overtime. 29 U.S.C. §207(a)(1) provides in pertinent part that no employer "shall employ any of his employees...for a work week longer than forty hours unless such employee received compensation for his employment in excess of [forty] hours at a rate not less than time and one-half the regular rate at

which he is employed." Plaintiffs contend that they were "employed" by Teledyne during all of the time which they spent on the boat less a credit for eating, sleeping and personal time and therefore are entitled to overtime for all hours in excess of forty hours.

In order to determine that an employee is "employed" so as to activate the overtime payment requirement of the FLSA, it is not necessary that he be engaged in active labor. The Supreme Court has held that he is employed for purposes of the statute if he is engaged to wait for work. Armour & Co. v. Wantock, 323 U.S. 126 (1944); Skidmore v. Swift & Co., 323 U.S. 134 (1944). Whether an employee is engaged to wait for work is a question of fact to be resolved by appropriate findings of the trial court. Skidmore v. Swift & Co., supra; Walling v.

Jacksonville Paper Co., 317 U.S. 564 (1942). As the Supreme Court stated in Swift this inquiry "involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was." 323 U.S. at 137.

Considering the overall circumstances of this case, the Court is convinced that the plaintiffs were paid for all time that they reasonably expected to be paid for and that their claims for extra compensation must be rejected in their entirety. First, the Court finds that as stipulated by the parties, all plaintiffs were fully aware of and understood that they would be paid for only time spent in active or physical labor while on their seven days on, regardless of where the barge was located, and that even though the plaintiffs received a reduction in their take-home pay after their regular schedule of hours was cut on non-income-producing jobs, this understanding and their awareness of what time they would be paid for never changed. The Court finds that the arrangement between plaintiffs and the company was that they would be paid for

their regular schedule of hours, whether it be 8 or 12, that they would be paid for all hours worked in excess of the regular schedule, and that this was to be the system whether the barge was offshore or docked.

The Fifth Circuit has addressed a similar situation in the case of Allen v. Atlantic Richfield Co., 724 F.2d 1131 (5th Cir. 1984). In Allen, twenty-two security guards at an Arco refinery brought suit alleging that Arco owed them additional overtime compensation for hours worked during a strike in 1980 by production employees. The guards normally worked three eight-hour shifts. During the strike, however, they worked twelve-hour on duty shifts each day. They were paid for their on-duty shifts and for any actual work required during the off-duty twelve-hour period. Otherwise the guards

were not paid for off-duty time when they were required to remain inside the refinery.

Evidence was introduced to show that this pay arrangement had been employed during two previous strikes in 1961 and 1969. Prior to each strike Arco met with the guard's union representatives. Agreements were put in writing that the guards would receive a higher than usual hourly rate for their first forty hours on duty each week and get time and a half that rate for any excess hours worked. These written agreements did not address the specific work hours. At a 1978 pre-strike meeting a company representative stated that the guards would not be paid for twenty-four hours a day during the strike.

Prior to the 1980 strike, at the pre-strike meeting, a company representative

told the guard's union representative that the guards would receive the higher rate of pay only for the twelve-hour on-duty time. An employee of Arco who interviewed all guard applicants testified that he told numerous guards when he interviewed them of the strike arrangement whereby guards stayed at the plant full-time but were paid only for twelve hours. Also, evidence was introduced of discussions between the guards which indicated that they understood they were to remain in the refinery on a twenty-four hour basis and only be paid for twelve-hour on-duty shifts.

During the initial stages of the strike the guards were required to remain in the refinery on a twenty-four hour basis during both their twelve-hour on-duty shifts and their off-duty time. The guards were provided sleeping quarters and

food was provided at no cost around the clock. So long as they remained inside the refinery, the guards were free to utilize various recreational facilities which were provided. Interruptions to non-work time were infrequent and when they did occur the guards were paid for those interruptions.

The Fifth Circuit rejected the guards' argument that no evidence should have been admitted to show that past practice resulted in an agreement regarding what was noncompensable time since the employees could not agree to waive their rights under the Fair Labor Standards Act. The Court noted that the Supreme Court had made it clear in Skidmore that "an agreement between the parties is one factor that the fact finder properly should consider." 724 F.2d at 1136. The trial court had properly admitted evidence

of an agreement between Arco and the plaintiff guards since the agreement was a circumstance to consider in determining whether the off-duty time in the plant was spent primarily for Arco's benefit.

After reviewing the record the Fifth Circuit concluded that there was sufficient evidence for the jury to conclude that an agreement did exist between the guards and Arco regarding time to be spent in the plant and affirmed the lower court decision that the guard's time spent on off-duty status was not work time.

In this case a similar agreement existed between the plaintiffs and Teledyne. As stated above, the evidence establishes that the plaintiffs were well aware of the fact that they would be paid only for their regular shift and any hours spent in active, physical labor and would not be paid for their off-duty time. The

evidence also establishes that the plaintiffs were aware of the no-leave policy. The fact that there was no written agreement does not negate the existence of such agreement. Skidmore, supra; Allen, supra; Rural Fire Protection Co. v. Hepp., 366 F.2d 355 (9th Cir. 1966); Bowers v. Remington Rand, Inc., 159 F.2d 114 (7th Cir. 1946), cert. denied, 167 S.Ct. 1083 (1947).

The Court rejects plaintiff's argument that the plaintiffs negated the existence of an implied agreement by the fact that they complained about having to stay on the barge after their daily work schedules were reduced from twelve hours to eight hours at all times when the barges were not working. What we are concerned about here is the agreement as to what hours would be considered to be working hours and not whether the

employees liked having to stay on the barges during their off hours. The plaintiffs knew about the no-leave policy and knew that they would not be paid during their off-hours. By their conduct in continuing to work for defendant with full knowledge of the compensation system, as well as the "no-leave" rule, they impliedly consented to the continued working arrangement that had always existed between the parties, as part of their employment in the offshore industry. Bowers v. Remington Rand, supra (failure of several plaintiffs to sign written agreements confirming new pay system not controlling, since employees continued to work for employer after system was instituted.) General Electric Co. v. Porter, 208 F.2d 805 (9th Cir. 1953) (court held, as a matter of law, that unilateral action of employer to pay

firemen on a monthly salary basis rather than hourly wages with overtime, was impliedly accepted when the firemen reported to work and worked pursuant to the new schedule).

An argument that the plaintiffs' continued employment could not equal an implied consent because their only choice other than accepting the policy was to lose their jobs, is rejected by this Court. The Ninth Circuit addressed a similar claim of economic compulsion in the case of Irwin v. Clark, 400 F.2d 882 (6th Cir. 1968). In that case the employees were on call twenty-four hours per day and seven days per week, but were not required to report at any given time, or remain for any stated period on the employer's premises. They were required to leave a telephone number where they could be called in the event that they

were needed. Many of the plaintiffs frequently came to defendant's place of business between seven and eight o'clock a.m. voluntarily and without being called. Often if there was no work to be done at the time of reporting, they would wait for some period on the employer's premises on the chance that a work order would come in and that their services would be needed. While thus waiting, the plaintiffs performed no services for the employer, but the men who were on the premises and immediately available were the ones who received the most work. The plaintiffs claimed that they reported and waited as they did because of the likelihood of a better paycheck. From this they argued that the waiting time was not voluntary as a matter of law. In short, the plaintiff's position was, if there is any economic reward for waiting, the

waiting must be compensated. The Sixth Circuit disagreed. The court cited Skidmore and stated: "[I]t is clear that economic compulsion is not a controlling factor." 400 F.2d at 884. The court noted that in Skidmore the firemen were required to stay in or close to the fire hall and presumably would not be hired were they unwilling to do so. The Supreme Court implied in its decision to remand the case for further proceedings that the district court might find as a matter of fact that "the waiting time (compelled as it was) was not working time." 400 F.2d at 884. Similarly, this Court recognizes that there was a degree of economic compulsion involved here but when considered as a factor along with the other factors, it does not negate the existence of an implied agreement that the employees would be paid only for their regular shift

and any hours actually spent in physical labor. See also, General Electric Co. v. Porter, supra.

The Court also rejects the notion argued by plaintiffs that the fact that defendant derived benefit from its no-leave policy classifies plaintiff's off-duty time as "hours worked". As recognized by the Fifth Circuit in Allen v. Atlantic Richfield Company, supra, the fact that the employer benefits from the employee being required to remain on the premises does not, alone, answer the question of whether or not the actual time in question is spent predominantly for the employer's benefit. "There are many instances, however, in which time spent on the employer's premises is not compensable working time." 724 F.2d at 1136. Whether time is compensable working time depends "upon the degree to which the employee is

free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call, without being required to perform active work." 724 F.2d at 1137. The stipulated facts and evidence show that during their off-duty time on the barges, the plaintiffs were free to sleep, eat, watch television, watch VCR movies, play pingpong or cards, read, listen to music, etc. They seldom or never did any physical work after their regular shift ended and if they did they were paid for it pursuant to the agreement.

Another factor which leads to the conclusion that the waiting time was not predominantly for the employer's benefit is the fact that both the employer and the employee stood to gain if the employees were ready to go the minute a job came up.

All parties concede that the economic situation at this time was very poor. When the barges were docked the employer was not producing any income. This case is distinguishable from Smith v. Superior Casing Crews, 299 F. Supp. 725 (E.D. La. 1969). In Smith the court awarded the plaintiffs compensation for all time spent riding on boats to and from offshore rigs and all time spent waiting on the rigs until it was time to run casing. Among the distinguishing facts of this case was the fact that their employer billed his customers for all of this time. In the instant case the employer did not have any customers to bill while they were sitting at the dock. This is the precise reason why there were at the dock. Both the employer and the employees were waiting to be engaged. If and when a job came in, by being on the barges, the employees were

assured of getting extra compensation. If they had been given the option to leave the employer's premises, it is arguable that many would have stayed on the barges just as the employees in Irwin v. Clark waited outside the gate of their employer to insure that they would be the ones sent out on the jobs. See also, Arthur v. K. D. Emrick Well Servicing Company, 209 F. Supp. 491 (E.D. Okla. 1962). The average employee lived more than one hundred miles from the fabrication yard and therefore would not have been able to respond within minutes if he was at home and job came up.

Lastly, the Court notes that the employer could have done legally what the plaintiffs contend they did "illegally." Instead of paying premium wages to the employees during their shifts and nothing during their off-duty hours, Teledyne could have cut them all to minimum wage

and paid them for twenty-four hours a day less a credit for sleeping and eating time. Given the economic situation at this time and the scarcity of jobs, it is arguable that the employees would have agreed to stay on under these circumstances. Instead they agreed to be paid premium rates for the hours they worked and nothing for the hours when they did nothing. It would be inequitable to impose the plaintiffs' requested sanctions upon Teledyne under these circumstances.

In conclusion, the Court holds that there was an agreement between Teledyne and the plaintiffs that they would stay on the barges for twenty-four hours and be paid only for their regular shift and any hours actually spent in physical labor. This agreement along with the fact that the employees seldom, if ever, were called to work after their regular shift, they

were free to eat, sleep and engage in various recreational activities, they benefited by being on the barges when a job did come up because they were able to insure themselves that they would earn overtime, and the fact that Teledyne could have accomplished the same result by paying the employees the minimum wage twenty-four hours a day less a credit for sleeping and eating time led this Court to conclude that the time spent waiting on the barges was not primarily for the employer's benefit. Although Teledyne did benefit from the arrangement, so did the employees. This Court holds that the employees were not "engaged to wait."

We now reach the final chapter of this case. The plaintiffs' retaliatory discharge claims were tried to a jury which return the following answers to the Court's interrogatories:

1. Did the filing of the lawsuit play any part in the employer's decision to discharge or lay off any plaintiffs?

Answer Yes or No: "Yes"

(Note: If you answered "No" to Question One, proceed no further. If you answered "Yes" to Question One, proceed to Question Two.)

2. Did the defendant have a legitimate non-discriminatory reason which played any part in the decision to discharge or lay off any plaintiffs?

Answer Yes or No: "No"

(Note: If you answered "No" to Question Two, skip Question Three and proceed to Question Four. If you answered "Yes" to Question Two, proceed to Question Three.)

3. Has any plaintiff proved by a preponderance of the evidence that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence?

Answer Yes or No: _____

(Note: If you answered "No" to Question Three, proceed no further. If you answered "Yes" to Question Three, proceed to Question Four.)

4. Were all of the discharged or laid-off plaintiffs discriminated against by the defendant?

Answer Yes or No: "Yes"

(Note: If you answered "Yes" to Question Four, proceed no further. If you answered "No" to Question Four, proceed to Question Five.)

5. Check the name(s) of the plaintiff(s) whom you conclude have been discriminated against by the defendant.

_____ Harry L. Bellard

_____ Kenneth Breaux

_____ Tommy L. Brown

_____ William E. Chandler, Jr.

_____ Keevin Comeaux

_____ Jimmy R. Edison

_____ John Jerry Deville

_____ Layman E. Gillmore

_____ Bruce A. Hebert

_____ Michael S. Hebert

_____ Lloyd A. Jones

_____ Seaborn L. Lott

Defendant has filed a motion for judgment notwithstanding the verdict or in the alternative, a new trial. As grounds for the judgment notwithstanding the verdict the defendant points to interrogatory number two where the jury concluded that the defendant had no legitimate non-discriminatory reason that played any part in the layoff or discharge of the employees. As grounds for a new trial defendant urges this same reason and also alleges juror misconduct.

This Court notes that in order to grant a judgment notwithstanding the verdict, the Court must conclude that the evidence, together with all the inferences

that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict. Coburn v. Pan American World Airways, Inc., 711 F.2d 339 (D.C. Cir. 1983). After reviewing the evidence presented at trial this Court concludes that a judgment notwithstanding the verdict is proper and will be granted.

As agreed by the parties and the Court before the trial of this matter, the burden of proof in this action is the same as that in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., and similar discrimination laws. The plaintiffs must prove by a preponderance of the evidence a prima facie case of discrimination. If plaintiff establishes a prima facie case of discrimination, the burden of production shifts to defendant to simply articulate a

legitimate, non-discriminatory reason for their action. If defendant meets that burden, the plaintiff has the opportunity to prove by a preponderance of the evidence that the reasons offered by defendant are not the true reasons, but are a pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The Court's first three interrogatories to the jury were based upon the above stated burden of proof. Although there was sufficient evidence to support the jury's conclusion in interrogatory number one, the Court concludes that no reasonable person could have concluded as the jury did in interrogatory number two. Throughout the trial, all parties conceded that due to the economic situation that

existed on March 1, 1984 the defendant, Teledyne, had to take some action to reduce costs. Plaintiff Bud Rousseau admitted under oath on the stand that the company had to take some sort of "job action" in March of 1984 because of the obviously poor business conditions. Counsel for plaintiffs argued in opening and closing statements that the plaintiffs were not contending that defendant did not have a need and a right to reduce payroll costs because of the economy, but that what they were attacking was defendant's choice of the layoff over the PCP program.

Defendant introduced evidence which established that Teledyne Movible Offshore has suffered a steady decline in business for the last several years, and that during the last few months prior to the March 1, 1984 layoff, its derrick barge utilization in the offshore division of

the construction department was at its lowest level in the history of the company. Testimony established that layoffs and the need for another layoff in the offshore division of its construction department was a topic of steady and repeated discussion between company officials long before any lawsuit was filed in October of 1983 and long before the layoff in March of 1984 took place. Due to a lack of work and poor economic conditions, the company had laid off hundreds of employees throughout the company, nohe of whom were suing the company for wage and hour violations at the time that the layoffs occurred. Specifically, Mr. Ned Travis testified that between 1980 and the end of 1984, 238 employees were laid off or terminated for lack of work in the drilling department; 112 employees were laid off or terminated

for lack of work in the fabrication yard division of the construction department; and that nine employees were laid off or terminated for lack of work in other departments of the company. Of these over 400 employees who lost their jobs because of lack of work, only a small group of them were placed on the partial claims program offered by the Department of Employment Security for the state of Louisiana. These were employees employed in the fabrication yard, who, because of the nature of their land-based job and their own particular work schedules, were considered by defendant to be well-suited to participate in the program. The drilling department, the offshore division of the construction department, and other miscellaneous departments of the company did not participate in the PCP program.

The offshore division itself had previously conducted a layoff of derrick barge employees in early 1980, due to lack of work. The system for determining who would be selected for the layoff was by determining which job classifications were least critical for the company's manning of its derrick barges, which is the same system the company testified it utilized in choosing who would be laid off in the March, 1984 layoff litigated in this case.

In October of 1982 the company considered a layoff but Mr. James Stanley, Vice President of Construction, testified that the company preferred to keep as many people on as it could, with the hope that business would improve. Rather than lay off half of its workforce in the offshore division, the company chose to reduce the regular schedule of hours from twelve to

eight on the days when the derrick barges were not working.

From October of 1982 through March of 1984, business did not improve and derrick barge utilization figures continued to decline, as shown in defendant's exhibits 1 and 20. Testimony revealed that throughout this time, Mr. Stanley and Mr. Theriot repeatedly and continuously discussed the fact that a layoff was imminent.

As stated above the defendant had only a burden of production, not a burden of persuasion. Its duty was merely to produce evidence of a legitimate, non-discriminatory reason for the layoff. "The defendant need not persuade the court that it was actually motivated by the proffered reasons....It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it

discriminated against the plaintiff." Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. at 254-255. The defendant met this burden. All of the evidence, as well as the contentions of both parties, convince the Court that the economic situation in the oil industry at the time of the layoff was such as to justify a decision to lay off employees in order to reduce costs. In light of the evidence, no reasonable juror could have concluded as the jury did in interrogatory number two.

Having decided that the defendant met its burden of production, and therefore, the jury's conclusion in interrogatory two was wrong, the Court must now decide whether the plaintiffs proved their case directly by a preponderance that a discriminatory reason more likely motivated the defendant or indirectly by a

explanation is unworthy of credence. Texas Dept. of Comm. Affairs v. Brodine, supra. The Court concludes that plaintiffs have failed to meet this burden.

Plaintiffs introduced evidence that when Mr. Theriot received a copy of the lawsuit, he posted it on the derrick barge bulletin boards immediately adjacent to a notice of an NLRB election which was underway at the time. Plaintiffs contend this was done so as to prominently display the names of those who brought the action.

Defendant claims its purpose was to talk to employees about the union and the lawsuit and their relationship to one another. Theriot wished to point out that the union's attorney, Mr. Wendell Lindsay, had also signed the lawsuit and to emphasize to employees that they had to separate the two and that one did not have to join the union in order to assert his

rights under the wage and hour laws. Theriot also called a meeting for that purpose and explained the above items to employees. He answered questions from the floor, pointing out that he was not certain what impact the lawsuit would have on company business, indicating that a large judgment could impact company business, and advised employees that he thought they would probably have to file suit on their own if they wanted to collect any money if the company was found in violation of the Fair Labor Standards Act. He also told the employees that it was the right of every employee to assert their rights under the wage and hour law and that no one would be retaliated against by doing so, and that they did not need to join the union to have protection in asserting their rights under the wage and hour law. All of these communications

by Mr. Theriot were corroborated and confirmed by plaintiffs who testified at trial.

The rest of plaintiffs' evidence merely attacks the defendant's business decision to lay off the employees as opposed to some other method of solving their financial problems, in particular the Partial Compensation Plan ("PCP").

Several weeks before the layoff, plaintiff Bud Rousseau approached Mr. Theriot with a proposal that instead of having a layoff the company could put the employees on the PCP program. This would have allowed the employees to work on a temporary basis, one week out of the month, and then draw unemployment compensation during some of the remaining weeks of the month. Mr. Theriot told Mr. Rousseau that he had already looked into it for the derrick barges in the previous

year at the same time that the fabrication yard employees had been put on it (before the lawsuit was filed), and that he had decided against it. However, Mr. Theriot told Mr. Rousseau that the company would study his proposal and consider it.

At trial Mr. Rousseau presented elaborate calculations in which his figures showed that the company could have spent less dollars by going to a PCP program rather than the March 1, 1984 layoff. An expert confirmed Mr. Rousseau's calculations but conceded on cross-examination that assuming vacation pay would accrue, the company would have saved a minimum of $5,000 per month by having the layoff instead of going to the PCP program.

Defendant put on evidence to show that Mr. Theriot asked James Kiesler, Offshore Division Manager, to study the

program and give recommendations on the program. He spent approximately three days studying it, performing cost estimates, and finding out about the mechanics of the PCP program as it related to the seven-and-seven employment of the derrick barge crews. Mr. Kiesler testified that his cost estimates showed that the company would save an additional $15,000 per month by going to the layoff instead of PCP. He also concluded that operationally the program would have been difficult and complicated and was not something that he saw to be of benefit to the company or its employees. He also felt that the slight additional earnings that the employees would have received by going to the PCP program would not have improved morale that greatly, as compared to putting a reduced workforce back on a twelve-and-twelve basis, with a ten (10%)

per cent cut in the pay rate. For these reasons, he recommended to Mr. Theriot that the company not go to the PCP program.

This Court is of the opinion that Teledyne had the exclusive right to decide on what course of conduct it would take to resolve its economic problems. Teledyne was not under a duty to implement the program that was least injurious to the employees. The Fair Labor Standards Act does not preclude an employer from making an adverse decision against an employee if that decision is not motivated by discriminatory reasons.

In the case of Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), the Court was faced with an Age Discrimination in Employment Act claim. The A.D.E.A. also utilizes the Title VII Burdine standard of proof. Stacy v. Allied Stores Corp., 581

F. Supp. 1103 (D.C.D.C. 1984). The court stated in footnote six:

> "While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason must be reasonably articulated and nondiscriminatory, but does not have to be a reason that the judge or jurors would act on or approve. Nor is an employer required to adopt the policy that will maximize the number of minorities, women, or older persons in his workforce. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 576-577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). An employer is entitled to make his own policy and business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination.

600 F.2d at 1012, n.6. See also Stacey v. Allied Stores Corp., supra; Williamson v. Owens-Illinois, Inc., 589 F. Supp. 1051 (N.D. Ohio W. D. 1984).

The court went on to point out that the reasonableness of the employer's reasons may be probative of whether they are pretexts. "The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one." 600 F.2d at 1012, n.6.

The evidence does not lead this Court to conclude that Teledyne's reasons were "idiosyncratic or questionable" or that they were a pretext. The defendant introduced evidence that they were experiencing an economic crisis and that they did investigate the PCP plan but determined it was infeasible. This decision is not "idiosyncratic." Under their cost analyses which included accrual of vacation time, Teledyne could save more money by using the layoff rather that the PCP program. This was corroborated by

plaintiffs' expert witness. Although plaintiffs claim they did not need vacation because under PCP they would have more time off, the Court recognizes that the employer may have considered that it was legally obligated to give vacation time. Indeed, in the only segment of the company ever temporarily put on a PCP program, the fabrication yard, the employees did continue to accrue vacation benefits. If vacation benefits were given generally within the company, Teledyne may have feared Title VII exposure by excluding these employees from those benefits.

Defendant also stated that they would have exposed themselves to greater liability under the PCP program due to its requirements. Under the PCP program, Teledyne would have been required to conduct midnight shift changes. A shift change at midnight out in the middle of

the Gulf of Mexico is very hazardous. Teledyne's consideration of this factor is not "questionable."

Finally, the Court notes that several of the plaintiffs in the wage and hour lawsuit were not laid off and that besides the plaintiffs that were laid off, several other people lost their jobs. These were people who had never filed a suit against Teledyne. Teledyne followed a plan in deciding who to lay off. They determined job classification priorities that they felt were essential to man the barges that would be kept in service. After that, they went by seniority within job classification and determined who would be laid off, just as they had done in the 1980 layoff.

Considering all of the evidence the Court holds that the plaintiff has failed to meet its burden of proving that

Teledyne's proffered reason for the layoff was a pretext for discrimination. The Court is satisfied that there was no evidence whatsoever that the defendant's decision to lay off the plaintiffs was in retaliation for the filing of the wage and hour lawsuit. The evidence and inferences point so strongly in favor of Teledyne Movible Offshore that reasonable minds could not arrive at a contrary verdict. Accordingly, the defendant's motion for judgment notwithstanding the verdict is GRANTED and judgment is entered in favor of the defendant.

At this point, the Court must consider defendant's alternative motion for a new trial pursuant to Federal Rule of Civil Procedure 50(c)(1). This ruling is conditioned upon a reversal or vacation of the judgment for defendant notwithstanding the verdict of plaintiff. It is

the opinion of the Court that new trial should be granted for the same reasons as advanced for the judgment notwithstanding the verdict. The Court rejects defendant's argument that a new trial should be granted on the basis of juror misconduct. The juror, Mrs. Kasperski, answered all questions truthfully. Her uncle, a former employee of Teledyne, is not a member of her "immediate family." Mrs. Kasperski did not give any indication that she could not be a fair and impartial juror.

For the foregoing reason, it is:

ORDERED that judgment be entered in favor of the defendant in the wage and hour claims tried to the Judge.

FURTHER ORDERED that defendant's motion notwithstanding the verdict is GRANTED and judgment is entered in favor of the defendant in the retaliatory discharge claims.

FURTHER ORDERED that defendant's alternative motion for a new trial is CONDITIONALLY GRANTED.

Opelousas, Louisiana, October 18, 1985.

s/John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

C. M. ROUSSEAU, JR., ET AL — CIVIL ACTION

VS.

NO. 83-2553

TELEDYNE MOVIBLE OFFSHORE, INC. — SECTION O

RULING

Now before the Court is a motion for a new trial filed on behalf of plaintiffs. Plaintiffs request a reconsideration of those portions of the October 22, 1985 judgment ruling in defendant's favor on the wage and hour claims tried before the judge, ruling in defendant's favor on defendant's motion for j.n.o.v. in connection with the retaliatory discharge claims, and ruling in defendant's favor on defendant's alternative motion for a new trial in connection with the retaliatory discharge claims.

Plaintiffs contend that such judgment is contrary to the law and evidence.

This Court has reviewed the record and determined that the judgment, dated October 22, 1985 is correct.

Plaintiff's motion for a new trial is DENIED.

Opelousas, Louisiana, December 10, 1985.

s/John M. Shaw
JOHN M. SHAW
UNITED STATES
DISTRICT JUDGE

§ 785.7 Judicial construction.

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business." (Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is

a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." (Armour & Co. v. Wantock, 323 U.S. 126 (1944); Skidmore v. Swift, 323 U.S. 134 (1944).) The workweek ordinarily includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." (Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).) The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities. See § 785.34.

CODE OF FEDERAL REGULATIONS

WAITING TIME

§ 785.14 General

Whether waiting time is time worked under the act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged." (Skidmore v. Swift, 323 U.S. 134 (1944).) Such questions "must be determined in accordance with common sense and the general concept of work or employment." (Central

Mo. Tel. Co. v. Conwell, 170 F.2d 641 (C.A. 8, 1948).)

§ 785.15 On duty.

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods dur-

ing which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. (See: Skidmore v. Swift, 323 U.S. 134, 137 (1944); Wright v. Carrigg, 275 F.2d 448, 14 W.H. Cases (C.A. 4, 1960); Mitchell v. Wigger, 39 Labor Cases, para. 66,278, 14 W.H. Cases 534 (D.N.M. 1960); Mitchell v. Nicholson, 179 F.Supp. 292, 14 W.H. Cases 487 (W.D.N.C. 1959).)

§ 785.16 Off duty.

(a) **General.** Periods during which an employee is completely relieved from duty and which are long enough to enable

him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

(b) **Truck drivers; specific examples.** A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is en-

gaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, D.C., to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip, the idle time is not working time. He is waiting to be engaged. (Skidmore v. Swift, 323 U.S. 134, 137 (1944); Walling v. Dunbar Transfer & Storage, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn.1943); Gifford v. Chapman, 6 W.H. Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla.1947); Thompson v. Daugherty, 40 F.Supp. 279 (D. Md. 1941).)

§ 785.17 On-call time.

An employee who is required to remain

on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remian on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (Armour & Co. v. Wantock, 323 U.S. 126 (1944); Handler v. Thrasher, 191 F.2d 120 (C.A. 10, 1951); Walling v. Bank of Waynesboro, Georgia, 61 F.Supp. 384 (S.D. Ga. 1945).)

REST AND MEAL PERIODS

§ 785.18 Rest.

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are

customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (Mitchell v. Greinetz, 235 F.2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); Ballard v. Consolidated Steel Corp., Ltd., 61 F. Supp. 996 (S.D. Cal. 1945).)

§ 785.19 Meal.

(a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period.

A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his dest or a factory worker who is required to be at his machine is working while eating. (Culkin v. Glenn L. Martin, Nebraska Co., 97 F.Supp. 661 (D. Neb. 1951), aff'd 197 F.2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 866 (1952) rehearing denied 344 U.S. 888 (1952); Thompson v. Stock & Sons, Inc., 93 F.Supp. 213 (E.D. Mich. 1950), aff'd 194 F.2d 493 (C.A. 6, 1952); Biggs v. Joshua Hendy Corp., 183 F.2d 515 (C.A. 9, 1950), 187 F.2d 447 (C.A. 9, 1951); Walling v. Dunbar Transfer and Storage Co., 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn.1943); Lofton v. Seneca Coal and Coke Co., 2 W.H. Cases 669; 6 Labor

Cases para. 61,271 (N.D. Okla.1942); aff'd 136 F.2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); Mitchell v. Tampa Cigar Co., 36 Labor cases para. 65,198, 14 W.H. Cases 38 (S.D. Fla.1959); Douglass v. Hurwitz Co., 145 F.Supp. 29, 13 W.H. Cases (E.D. Pa. 1956).)

(b) **Where no permission to leave premises.** It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

SLEEPING TIME AND CERTAIN OTHER ACTIVITIES

§ 785.20 General.

Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities.

§ 785.21 Less than 24-hour duty.

An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime. (Central Mo. Telephone Co. v. Conwell, 170 F.2d 641 (C.A. 8, 1948); Strand v. Garden Valley Telephone Co., 51 F.Supp. 898 (D. Minn.1943); Whitsitt v. Enid Ice & Fuel Co., 2 W.H. Cases 584; 6 Labor Cases para. 61, 226 (W.D. Okla. 1942).)

§ 785.22 Duty of 24 hours or more.

(a) **General.** Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. (Armour v. Wantock, 323 U.S. 126 (1944); Skidmore v. Swift, 323 U.S. 134 (1944); General Electric Co. v. Porter, 208 F.2d 805 (C.A. 9, 1953), cert. denied, 347 U.S. 951, 975

(1954); Bowers v. Remington Rand, 64 F.Supp. 620 (S.D. Ill. 1946), aff'd 159 F.2d 114 (C.A. 7, 1946), cert denied 330 U.S. 843 (1947); Bell v. Porter, 159 F.2d 117 (C.A. 7, 1946), cert. denied 330 U.S. 813 (1947); Bridgeman v. Ford, Bacon & Davis, 161 F.2d 962 (C.A. 8, 1947); Rokey v. Day & Zimmerman, 157 F.2d 736 (C.A. 8, 1946); McLaughlin v. Todd & Brown, Inc., 7 W.H. Cases 1014; 15 Labor Cases para. 64,606 (N.D. Ind. 1948); Campbell v. Jones & Laughlin, 70 F.Supp. 996 (W.D. Pa. 1947).)

(b) Interruptions of sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee

cannot get at least 5 hours' sleep during the scheduled period the entire time is working time. (See Eustice v. Federal Cartridge Corp., 66 F.Supp. 55 (D. Minn. 1946).)

§ 785.23 Employees residing on employer's premises or working at home.

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is of course difficult to determine the exact hours worked under these circumstances and any reasonable

agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (Skelly Oil Co. v. Jackson, 194 Okla. 183, 148 P.2d 182 (Okla. Sup. Ct. 1944); Thompson v. Loring Oil Co., 50 F.Supp. 213 (W.D. La.1943).)

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

C. M. ROUSSEAU, JR., ET AL,
Petitioners,

V.

TELEDYNE MOVIBLE OFFSHORE, INC.,
Respondent.

The foregoing appendix to application for writ of certiorari is submitted by counsel for petitioners.

Baton Rouge, Louisiana, this 13th day of June, 1987.

Wendell G. Lindsay, Jr.
WENDELL G. LINDSAY, JR.

NO. _____

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Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, Wendell G. Lindsay, Jr., a member of the bar of this Court, hereby certify that on this 12th day of June, 1987, three copies of the Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth

Circuit in the above entitled case were mailed, first class, postage prepaid, to Mr. Greg Guidry, Post Office Box 3507, Lafayette, Louisiana 70502, counsel for the respondent, Teledyne Movible Offshore, Inc. I further certify that all parties required to be served have been served.

Wendell G. Lindsay, Jr.

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Supreme Court, U.S.
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No. 86-1997

In The

Supreme Court of the United States

October Term, 1986

C.M. ROUSSEAU, JR., *et al.*,

Petitioners,

vs.

TELEDYNE MOVIBLE OFFSHORE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the district court's ruling that, based on all of the facts and circumstances, the off-duty time of Respondent's derrick barge workers spent on board the derrick barge during their seven-day hitch, whether the barge was docked or offshore, was not compensable under the Fair Labor Standards Act.

LIST OF AFFILIATED CORPORATIONS

Teledyne, Inc. is the parent corporation of Respondent, Teledyne Movible Offshore, Inc.

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No. 86-1997

In The
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October Term, 1986

C.M. ROUSSEAU, JR., *et al.*,
Petitioners,

vs.

TELEDYNE MOVIBLE OFFSHORE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE FACTS

Petitioners' Statement of the Facts is misleading, selective, and incomplete. The Court is referred to the opinion of the district court for a complete and accurate statement of the relevant facts in this matter, most of which were stipulated to by the parties at trial. Petitioners' Appendix (hereinafter "Pet. App.") 21-33.

The more significant misstatements and omissions in Petitioners' Statement are as follows: First, Petitioners fail to note that their trial testimony establishes that at all times during their employment, in good times and bad, and before and after their daily work schedule was reduced from twelve hours to eight hours, they were fully aware that they would be paid only for that time they spent actively engaged in physical labor and not for time spent "off-duty" on the derrick barge. This arrangement and understanding never changed.

Second, although the testimony indicated that the no-leave rule did "come into focus" more after the derrick barges began spending more time dockside, because now employees were adjacent to the land more often, the overwhelming testimony of the employees showed that they had always been aware of the no-leave rule. Thus, Petitioners' statement that the no-leave rule had not been publicized prior to the 1982 reduction in hours is a misstatement of the record.

Third, the statement that the change in the daily schedule from twelve to eight hours came "shortly" after dockside time increased is incorrect. The barges began "docking" in 1980, approximately two years prior to the reduction in hours. Finally, Petitioners do not mention that the reduction in the scheduled hours was chosen by Respondent as a cost-saving measure in lieu of a layoff, which was seriously considered at the time, and was an option chosen in several other divisions of the Company.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

I. SUMMARY OF THE ARGUMENT

Despite Petitioner's hyperbolic attempt to attach significance to the decisions below as the beginning of the end to private enforcement of the Fair Labor Standards Act of 1938, as amended, the fact of the matter is that both decisions are nothing more than well-reasoned and practical applications of well-established principles of interpretation of this Court to the particular facts involved in this matter. The decisions below are not in conflict with any previous decision of this Court, nor will they have the adverse future impact unbelievably suggested by Petitioners. In essence, the Petition amounts to little more than a request that this Court engage in its own factual scrutiny of the trial evidence regarding the arrangement between Petitioners and Respondent concerning the compensability of certain hours. No amount of rhetoric can convert the highly fact specific issue involved in this case into one warranting review on certiorari.

II. THE DECISIONS BELOW DO NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

Amazingly, Petitioners contend that the Court of Appeals' decision directly conflicts with the two leading decisions of this Court concerning the compensability of "waiting time," *Armour & Company v. Wantock*, 323 U.S. 126 (1944) and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Rather than conflicting with the principles established by this Court in *Armour* and *Skidmore*, the analysis of the district court affirmed by the Court of Appeals epitomizes proper application of the analytical stan-

dards enunciated in those two decisions and rejects Petitioners' request to apply generalized examples contained in administrative guidelines to a unique fact setting.

In *Skidmore*, this Court made it clear that it would not and could not lay down a legal formula to resolve cases so varied in facts as are the many situations in which employment involves waiting time. 323 U.S. at 132-133. Despite Petitioners' insistence that those cases somehow control this one, because of the similarity of some of the facts[1], the only "rule" enunciated by this Court in *Armour* and *Skidmore* is that there are no general controlling rules in an "hours worked" determination and that each case must turn on its own facts. As stated by this Court in *Skidmore*:

> Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. . . . This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. . . The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was. 323 U.S. at 136-137.

---

[1]The Petitioners' argument that the *Skidmore* decision controls and thus dictates a different result herein also ignores the fact that *Skidmore* did *not* find that the waiting time in question was compensable, but reversed and remanded, based on the erroneous view of the law held by the lower court. In fact, the Court specifically noted factual differences between the case before it and *Armour* that could lead to a finding of noncompensability. 323 U.S. at 140.

As well-stated by the Court of Appeals below, findings of compensability are "highly fact specific." Pet. App. 5. It, like the district court, properly recognized that when it comes to "hours worked" determinations, including those involving "waiting time," a court cannot look to the facts of previous decisions for controlling guidance, since each determination must turn upon careful scrutiny of the facts before it. It reviewed the fact findings of the district court and properly found that the findings were supported by the record.

Despite Petitioners' refusal to admit it, the circumstances of this case are unique, and were treated as such by the district court in arriving at its conclusion that the hours in question were noncompensable. It is obvious from reading the district court decision on the hours worked question, Pet. App. 20-52, that it did not base its finding of noncompensability on one or two factors, but that it analyzed the entire relationship between the parties, including the total history of Petitioners' employment with Respondent and their long-existing working arrangement, the particular worksite involved, the fact that the Petitioners worked a "seven-and-seven" shift, and the underlying economic situation. Obviously, Petitioners would have preferred it if the district court would have not conducted a careful scrutiny of the unique circumstances involved in the case before it, and would have simply said "Since the employees could not leave the premises during their off-duty time, since they preferred to be elsewhere, and since these facts in many work settings might mean compensability, I find the hours in question compensable." However, this approach would have been directly contrary to the dictates of this Court

in *Skidmore*. As recognized by the Court of Appeals, the district court correctly applied the method of analysis required by this Court's previous holdings, and by no stretch of the imagination does its decision conflict with those holdings.

Petitioners also contend that the decision below is somehow inconsistent with this Court's decision in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981). The contention is that since *Barrentine* held that employees cannot waive their rights under the Fair Labor Standards Act by entering into agreements to do so, Petitioners could not waive their rights herein by entering into any implied agreement with Respondent as to which hours would be compensated. This argument has been repeatedly made by Petitioners in the lower courts, and has been properly rejected. It is clear that the implied agreement found by the courts below helped *define* the rights of the parties. The question is not whether rights can be waived by the parties but rather what are the rights of the parties.

The waiver argument has been made by plaintiffs in hours worked cases before, and has consistently been rejected as inapplicable when a court is determining whether or not an agreement exists for purposes of defining compensable time. A good example is *Bowers v. Remington Rand, Inc.*, 159 F.2d 114 (7th Cir. 1946), *cert. den.*, 330 U.S. 843 (1947), in which the court was also faced with an argument by the plaintiffs that they were entitled to 24-hour compensation because overtime rights could not be waived. The court disagreed with this theory and/or characterization of the case, stating:

> To be sure, agreements which violate the provisions or purposes of the Act will not be given effect. That rule is settled; that rule, however, does not apply to an agreement to settle the question of whether certain activity or non-activity constitutes work or employment. 159 F.2d at 116.

The Fifth Circuit has also recently rejected the same waiver argument in *Allen v. Atlantic Richfield Company*, 724 F.2d 1131, 1135-1136 (5th Cir. 1984).

Finally, the Petitioners' claim that the decisions below conflict with this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), is also without merit, since *Anderson* dealt with the issue of whether or not certain time spent in certain "preliminary" or "postliminary" activities on the employer's premises was compensable and was not concerned with extended periods of inactive, off-duty "waiting" time spent by employees who reside on the employer's premises. That an issue of a different dimension was involved is well-evidenced by this Court's failure to discuss or even cite its previous decisions in *Armour* and *Skidmore*.

Thus, it is patently obvious that the decisions below meticulously follow, rather than conflict with, the mode of analysis adopted in prior waiting time decisions of this Court.

III. THE DECISIONS BELOW ARE NOT CONTRARY TO THE WAGE AND HOUR ADMINISTRATOR'S GUIDELINES

Throughout the litigation in the lower courts, and again in their Petition, Petitioners argue that the Interpretative Bulletin of the Administrator of the Wage and Hour Division somehow "controlled" this case and mandated a finding that the hours in question were compen-

sable. This argument was properly ignored by the lower courts, in light of the dictates of this Court in *Skidmore,* and the recognition by the Wage and Hour Administrator himself, that there can be no formula for general application in every case.

It is also significant that this Court has made it clear that although the guidelines issued by the Administrator of the Wage and Hour Division do constitute "a body of experienced and informed judgment to which courts and litigants *may* properly resort for guidance," they are not controlling on courts, and courts have the power to issue rulings that may be at odds with the guidelines "where justified by very good reasons." *Skidmore,* 323 U.S. at 140. Thus, even if the rulings below did conflict with the guidelines, it was within the lower courts' judicial prerogative to reject their application in this case.

Of course, Petitioners' argument assumes that the lower court decisions conflict with the Administrator's guidelines, which is a totally insupportable position. Even the Administrator has recognized that its practical guidelines set out in the Interpretative Bulletin at 29 C.F.R., Part 785, cannot include every possible situation, and that they only seek to apply principles to situations that "frequently arise." At 29 C.F.R. 785.1, he cautions that "no inference should be drawn from the fact that a subject or an illustration is omitted." Needless to say, a case involving seven-and-seven hitch workers residing on movable derrick barges in the declining offshore oil industry of Louisiana is not a situation that frequently arises, and is not one that has been treated in the guidelines.

The Administrator restates the *Skidmore* and *Armour* principles in 29 C.F.R. § 785.14, declaring whether or not "waiting time" is compensable "depends upon particular

circumstances" in each case. After this general introduction, the Administrator simply gives examples of factors that may be relevant in attempting to determine whether an employee is "on duty," "off duty," etc., and whether certain time is compensable. It is these examples that Petitioners argue are controlling on the courts in this matter. This argument is contrary to the case law and to the guidelines themselves.

IV. THE DECISIONS BELOW DO NOT HOLD THAT A FAILURE TO QUIT LEGITIMATES A VIOLATION OF THE FAIR LABOR STANDARDS ACT, NOR DO THEY HOLD THAT THE PETITIONERS' FAILURE TO QUIT IN AND OF ITSELF CREATED AN IMPLIED AGREEMENT

In order to attribute cataclysmic significance to the lower courts' decisions so as to create an issue worthy of review, Petitioners characterize the holdings below as saying that if an employee fails to quit his employment when faced with a practice that violates the Fair Labor Standards Act, he will be bound by the practice. A review of the decisions indicates the patent absurdity of this characterization, and no additional response is necessary.

Petitioners also seem to suggest that the district court based its finding of an implied agreement solely on the basis that the employees failed to resign their employment after the schedule change from twelve to eight hours in October of 1982. Again, a review of the decisions demonstrates the misplaced nature of this characterization. The district court, in finding an implied agreement between the parties, considered the entire relationship between the parties, and focused on the testimony of the Petitioners themselves that they always fully understood what hours they

would be paid for at all times during their employment with Respondent and that this understanding regarding compensability never changed, regardless of the circumstances.

The evidence did show that the Petitioners did complain more about having to stay on the barge after their daily work schedules were reduced from twelve hours to eight hours. They thus argued to the lower courts that these complaints negated any continued implied agreement as to compensability that may have existed prior to the reduction. In response, the district court stated that the "working arrangement" regarding what hours would be paid never changed, and that the mere fact that they complained more after the reduction did not negate the continued existence of an implied agreement regarding the compensability of the off-duty hours. Pet. App. 17, 22-25. It is clear that the district court did not hold that the implied agreement regarding compensability was created by the employees' failure to quit after the schedule change; it simply held that the already-established implied agreement was not affected by the post-reduction increase in complaints. In so concluding, the court noted the well-established principle of employment law that continued employment with full knowledge and awareness of a term of employment may be considered to be an implied agreement to said term, despite dislike of the term. *E.g., Williams v. Jacksonville Terminal Company,* 315 U.S. 386, 398 (1942); *Shepler v. Crucible Fuel Company,* 140 F.2d 371, 374 (3rd Cir. 1944); *Peffer v. Federal Cartridge Corporation,* 63 F.Supp. 291, 304 (D.C. Minn. 1945). The actions of Petitioners in this case were consistent with this accepted principle.

The Court of Appeals simply held that the record supported the district court's factual finding of an agreement between the parties, and it agreed with the district court that the employees' expressed dislike of the no-leave rule did not negate the unchanged working agreement regarding compensability. Pet. App. 7.

Also without merit is the attempt of Petitioners to strike an analogy between the criminal case of *Garrity v. State of New Jersey,* 385 U.S. 493 (1967) and this case. That case involved the constitutional protection against self-incrimination, and the specific issue was whether or not the State can use the threat of discharge to secure incriminatory evidence against an employee. In holding that it could not, this Court did distinguish, however, the dictum of Justice Holmes in an earlier state court decision, in which he declared a principle more relevant to the case *sub judice:* that generally, with respect to the implied terms of his contract, an employee "cannot complain, as he takes the employment on the terms which are offered to him." 385 U.S. at 499.

V. THE HOLDINGS OF THE DECISIONS BELOW ARE LIMITED TO THE UNIQUE FACTS OF THIS CASE AND WILL HAVE NO SIGNIFICANT FUTURE IMPACT

It is the mischaracterization of the holdings below, discussed in the preceding section, that lead into Petitioners' contention that the rulings below will impact millions of American employees in various industries by allowing employers to imprison them on their premises without pay, and if the employees do not quit their job, the system of compensation deemed to be validated automatically. The

absurdity of this proposition is demonstrated by a realistic reading of the decisions and by the fact that it is well-established that no case decided on an "hours worked" issue will control any future case, this possibility being proscribed by this Court. As stated by this Court in *Skidmore*, "[e]ach case must stand on its own facts." 323 U.S. at 140. Additionally, when one examines the unique overall factual circumstances involved in this case, the likelihood of its having any future precedential value, even by analogy, is miniscule.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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